No. 92-357

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

Ruth O. Shaw, *et al.*
Appellants,
v.
William Barr, *et al.*
Appellees.

On Appeal from the United States District Court for the Eastern District of North Carolina

BRIEF *AMICUS CURIAE* OF THE REPUBLICAN NATIONAL COMMITTEE IN SUPPORT OF APPELLANTS

BENJAMIN L. GINSBERG
MICHAEL A. HESS*
DALTON L. OLDHAM
310 First Street, S.E.
Washington, D.C. 20003
(202)863-8638
Counsel for Amicus Curiae
Republican National Committee

*Counsel of Record
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The Republican National Committee submits this brief as *amicus curiae* in support of appellants' claim that the judgment of the United States District Court for the Eastern District of North Carolina, entered on August 7, 1992, should be reversed. Pursuant to Rule 37.2, all parties to this appeal have given their written consent to the filing of this brief. Copies of the letters of consent have been filed with the Clerk of this Court.

INTEREST OF THE AMICUS

The Republican National Committee is a non-profit, unincorporated association which has participated in a variety of election law and voting rights cases before this Court as either a

party or *amicus*, including: *Karcher* v. *Daggett*, 462 U.S. 725 (1983); *Davis* v. *Bandemer*, 478 U.S. 688 (1989); and *Thornburg* v. *Gingles*, 478 U.S. 30 (1986). The Republican National Committee and its membership support fair and effective representation for citizens of North Carolina, and believe that the challenged congressional redistricting plan and the judgment of the court below impede such a result.

SUMMARY OF ARGUMENT

Amicus Republican National Committee supports appellants' contention that the challenged congressional redistricting plan was an intentional race-conscious gerrymander which had the effect of dissecting demonstrable geographic, jurisdictional, racial and political communities. The Republican National Committee does not take a position on whether such redistricting is unconstitutional *per se*, but suggests that, at a minimum, appellants' allegation of discriminatory intent and effect create a presumption of unconstitutionality that can only be overcome by evidence of a legitimate and compelling state interest.

This Court's opinions in *Karcher* v. *Daggett* and *Davis* v. *Bandemer* suggest that the challenged plan must be examined for legitimate underpinnings reflecting legitimate state interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives. No such valid underpinnings exist in this case, and the state's purported justifications -- the mandates of the Voting Rights Act and the recommendations of the Attorney General of the United States -- are mere pretexts for unconstitutional gerrymandering, the principal goal of which was incumbency protection.

Amicus Republican National Committee believes that this Court's opinion in *United Jewish Organizations* v. *Carey*, 430 U.S. 144 (1977), permits a finding in favor of the appellants while leaving this Court's precedents -- and the Voting Rights Act -- intact. While that case endorsed the goal of fair representation for minorities pursuant to Section 5 of the Act, it suggested that minority districts should be created "employing sound redistricting

principles such as compactness and population equality," with deference to existing "residential patterns." *Id.*, 430 U.S. at 168. When measured against any neutral standard of sound redistricting, the challenged plan fails.

Not only does North Carolina's congressional redistricting stand contrary to this Court's requirement of geographic compactness in *Thornburg* v. *Gingles*, it fails when measured against virtually all other neutral, manageable and time-honored redistricting criteria.

Amicus Republican National Committee respectfully urges the Court to consider these criteria, not only in the context of the Voting Rights Act, but in all redistricting contexts, particularly in cases where, as here, race is the surrogate used to achieve the political goal of incumbency protection.

ARGUMENT

I. NORTH CAROLINAS' CONGRESSIONAL DISTRICTS ARE DISCRIMINATORY IN INTENT AND EFFECT, AND CANNOT BE CONSTITUTIONALLY JUSTIFIED.

In noting probable jurisdiction in this case, this Court directed all parties to brief the following question:

> Whether a state legislature's intent to comply with the Voting Rights Act and the Attorney General's interpretation thereof precludes a finding that the legislature's congressional redistricting plan was adopted with invidious discriminatory intent where the legislature did not accede to the plan suggested by the Attorney General but instead developed its own.

61 U.S.L.W. 3418 (Dec. 7, 1992).

Amicus Republican National Committee suggests that the answer to the Court's question is a resounding "No," because the North Carolina General Assembly devised a plan discriminatory in

both intent and effect, with no consistent, legitimate state policy justifications.

Appellants in this case clearly demonstrated that they can prove that the challenged plan was a race-conscious gerrymander. In his dissenting opinion, District Judge Voorhees points to:

> ...[a] constitutionally suspect, and potentially unlawful, intent on the part of the State Defendants. Moreover, the majority assumes that, because the North Carolina General Assembly is controlled by a white majority, the State Defendants could not have held an invidious discriminatory intent against Plaintiffs. ... I question the validity of such an assumption. The shift of the proposed minority-majority district from south-central or southeast North Carolina to the piedmont area of the State and the contorted shape of the Twelfth District could be indicative of a racial animus against eastern North Carolina black voters or piedmont North Carolina white voters.

J.S. App. A at 44a.

These district configurations have the clear effect of dissecting demonstrable geographic, jurisdictional, racial and political communities of interest. The "inescapable human effect of this essay in geometry and geography," *Gomillion* v. *Lightfoot*, 364 U.S. 339, 347 (1960), is neither mitigated nor justified by any compelling state interest.[1]

In *Gaffney* v. *Cummings*, 412 U.S. 735 (1973), this Court noted that the Connecticut redistricting plan at issue undertook "not to minimize or eliminate the political strength of any political group or party, but to recognize it and, through districting, provide

[1] *Amicus* does not take a position on whether, upon a showing of discriminatory intent and effect, race-conscious redistricting is unconstitutional *per se*. It may be that there is a presumption that race has been used for an invidious purpose, a presumption that can only be overcome by evidence of a legitimate and compelling state interest.

a rough sort of proportional representation" of the two major political parties, by taking into account party voting results in the three preceding statewide elections. *Id.* at 754. While *Gaffney* demonstrates that it may be legitimate for a state to take competing political interests into account in redistricting, it does not support the action taken by the North Carolina General Assembly, since there was no claim of invidious discrimination in *Gaffney*.

The North Carolina plan stands in clear contrast to the fourteenth and fifteenth amendments' prohibitions on restricting voting rights on account of race. In *Gomillion*, this Court concluded that when "a legislature thus singles out a readily isolated minority for special discriminatory treatment, it violates the Fifteenth Amendment." 364 U.S. at 346. In the municipal boundary plan challenged in *Gomillion*, blacks were effectively "fenced out" of the City of Tuskegee. In North Carolina, blacks have been "fenced into" bizarre districts that serve no benign or legitimate purpose, in light of the alternatives available to the General Assembly. Indeed, the sole discernible purpose behind the shape of these districts is the preservation of white incumbents.

If North Carolina's congressional districts are not unconstitutional *per se*, they should be invalidated on the basis of the balancing test used by this Court in *Karcher* v. *Daggett*, 462 U.S. 725 (1983). In *Karcher*, this Court concluded that plaintiffs' success in proving that the challenged congressional plan "was not the good-faith effort to achieve population equality [shifted the burden] to the State to prove that the population deviations in its plan were necessary to achieve some legitimate state objective." 462 U.S. at 740.

This Court determined that:

> [the] State must ... show with some specificity that a particular objective required the specific deviations in its plan, rather than relying on general assumptions. The showing required to justify population deviations is *flexible*, depending on the size of the deviations, *the importance of the State's interests, the consistency with*

> *which the plan as a whole reflects those interests, and the availability of alternatives which might substantially vindicate those interests* yet approximate population equality more closely.

462 U.S. at 741 (emphasis added).

A similar approach was suggested in *Davis* v. *Bandemer*, 478 U.S. 109 (1986), where this Court summarized the requirements for making an equal protection challenge to a gerrymander:

> If there were a discriminatory effect and a discriminatory intent, then the legislation would be examined for valid underpinnings. Thus, evidence of exclusive legislative process and deliberate drawing of districts in accordance with accepted gerrymandering principles would be relevant to intent, and evidence of valid and invalid configuration would be relevant to whether the districting plan met legitimate state interests.

Id. at 141.

The use of a similar test would be appropriate here where, as in *Karcher*, alternative plans with less radical effects were available to the General Assembly. The only credible justification for these districts is the desire for incumbency protection, which is insufficient justification to overcome the state's heavy burden.

II. THE NORTH CAROLINA GENERAL ASSEMBLY USED THE VOTING RIGHTS ACT AS A PRETEXT FOR UNCONSTITUTIONAL CONGRESSIONAL REDISTRICTING.

The appellees here would argue that North Carolina's congressional districts were necessitated by a reliance on the mandates of the Voting Rights Act and the recommendations of the Attorney General of the United States in enforcing the Act. In reality, the General Assembly used the Act and enforcement by the

Attorney General as a pretext to achieve unconstitutional ends. *Cf. Karcher* v. *Daggett*, 462 U.S. at 742-744.[2]

It cannot be credibly suggested that the Voting Rights Act of 1965, *as amended*, requires the creation of congressional districts of the sort at issue here. Even if the Voting Rights Act were to be construed in the pretextual manner argued by appellees, nothing in the Act or its application by the Attorney General would have required the convoluted and irrational intertwining of districts embodied in the challenged plan.

The existence and availability of alternative plans which create two majority-minority districts, while remaining contiguous and relatively compact, belie any suggestion that districts of the sort concocted by the North Carolina General Assembly are required by the Voting Rights Act. Indeed, rather than complying with the Voting Rights Act, North Carolina attempted to use the rejection of its plan by the Attorney General as a shield to implement race-conscious political gerrymandering that it hoped would be beyond the reach of the courts. *See* Voorhees, J., dissenting, J.S. App. A at 30a. As Judge Voorhees noted in his dissent:

> It seems implausible that even the fiercest partisan of the Voting Rights Act would have imagined, at the time of its inception, that the Act gave *carte blanche* to white dominated state legislatures to draw districts virtually immune from judicial review, so long as the cry is raised: 'We are only complying with the Voting Rights Act.'

J.S. App. A at 40a-41a.

Nothing in Section 2 or Section 5 of the Voting Rights Act requires that jurisdictions create districts without respect to other considerations, such as compactness, contiguity and the geographic

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[2] *Amicus* Republican National Committee does not believe it necessary to reach the issue raised by the appellants regarding the disclaimer against proportional representation in 42 U.S.C. § 1973 in order to answer the question presented by this Court in the negative.

distribution of the minority group's members. Rather, the Voting Rights Act is meant to ensure that minority *population concentrations* are neither fragmented so that protected minorities are denied districts in which they have a "realistic opportunity to elect candidates of their choice," nor packed or collapsed into districts in such a fashion as to waste minority voting strength.[3]

The December 18, 1991 letter from Assistant Attorney General John Dunne denying preclearance of an earlier congressional bill ("Dunne letter") indicated that the configuration of Congressional District 2 (the only black majority district in the initial congressional submission from North Carolina)[4] was not required to achieve the purpose of avoiding minority vote dilution: "The unusually convoluted shape of that district does not appear to have been necessary to create a majority black district and indeed, at least one alternative configuration was available that would have been more compact." Dunne letter at 4.[5]

It is simply inaccurate to suggest that the tortuous shape of the black majority congressional districts in either that first submission or subsequent submissions were required to comply with Section 5.

Moreover, neither the Voting Rights Act nor the Attorney General of the United States can be blamed for the tortuous construction of districts *outside* the minority areas, including the

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[3] *See* B. Grofman and L. Handley, *Identifying and Remedying Racial Gerrymandering*, VIII J. L. & POL. 345 (1992).

[4] Subsequently revised somewhat in shape and renumbered as District 1 in the challenged plan.

[5] Reproduced in *Pope* v. *Blue*, No. 91-2038, J.S. App. D at 54a. Appellants referred to and incorporated by reference the Jurisdictional Statement in this case. *Shaw*, J.S. at 3, 8. It is further the understanding of *amicus* Republican National Committee that the appellants intend to lodge copies of the Jurisdictional Statement in *Pope* with the Clerk of this Court.

convoluted and irrational intertwining of Districts 5, 9, 10 and 11 in the western part of the state, where the racial minority population is minimal. In fact, of the ten counties fragmented in this part of the state, only Cleveland County is a covered jurisdiction under § 5 of the Voting Rights Act. 28 C.F.R. Part 51, Appendix.

The preclearance denial letter from Assistant Attorney General Dunne also indicated that failure to create a second "majority minority" district in the *southeastern* portion of the state had led to a Justice Department decision to deny preclearance to North Carolina's initial congressional submission.

> [The] proposed configuration of the district boundary lines in the *south central to southeastern* part of the state appear to minimize minority voting strength given the significant minority population in this area of the state. In general, it appears that the state chose not to give effect to black and Native American voting strength *in this area*, even though it seems that boundary lines that were no more irregular than found elsewhere in the proposed plan could have been drawn to recognize such minority concentration *in this area of the state*.

Dunne letter at 5 (emphasis added). The suggestion by the Attorney General that a second majority-minority district be drawn in the *southeastern* portion of the state cannot have mandated the North Carolina General Assembly to create a snakelike majority-minority district in the *central part of the state*, nor the bizarre and uncouth configurations in the *western* part of the state.[6]

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[6] The Attorney General's consistent position has been that the Voting Rights Act does not force jurisdictions to draw convoluted districts. In a November 18, 1991 letter which precleared the Texas congressional redistricting plan, despite contorted districts, Assistant Attorney General Dunne stated:

> While we are preclearing this plan under Section 5, the extraordinarily convoluted nature of some districts compels me to disclaim any implication that our preclearance establishes that

A letter from the Attorney General informing a jurisdiction it has failed to comply with § 5 cannot grant blanket immunity on that jurisdiction for any subsequent plan when more rational alternatives exist.[7] In this case, North Carolina could have drawn more compact and contiguous districts that complied with the Voting Rights Act, but refused to do so because it would hurt incumbents. In effect, North Carolina made incumbency superior to the Act, a result not sanctioned by the law.

III. THE DISTRICT COURT ERRED IN RELYING ON *UNITED JEWISH ORGANIZATIONS, INC.* V. *CAREY* TO JUSTIFY NORTH CAROLINA'S CONGRESSIONAL DISTRICTS.

The district court concluded that this Court's opinion in *United Jewish Organizations* v. *Carey*, 430 U.S. 144 (1977) ("*U.J.O.*") supports the right of the North Carolina General Assembly to make racially conscious redistricting decisions as long as the General Assembly was attempting "to meet the broad remedial requirements of the Voting Rights Act." J.S. App. A at 19a.

> the proposed plan is otherwise lawful or constitutional. I understand that litigation challenging the legal and constitutional propriety of various districts is pending. *Terrazas* v. *Slagle*, [789 F. Supp. 828 (W.D. Tex. 1991), *aff'd*, 113 S. Ct. 29 (1992)]. Our preclearance of the submitted redistricting plan in no way addresses the state's approach to its redistricting obligations other than with regard to Section 5.

Dunne letter at 2.

[7] Even the February 6, 1992 letter from Assistant Attorney General Dunne preclearing the challenged plan cannot be read to give the plan an imprimatur, since the letter included a standard disclaimer: "We note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin enforcement of the changes." Preclearance letter of John Dunne, Feb. 6, 1992, reproduced in *Pope* v. *Blue*, J.S. App. D at 146a.

In *U.J.O.*, a New York City Hasidic Jewish community, which had previously been located entirely in one state assembly district and one senate district, was split between two assembly and two senate districts, in order to create substantial nonwhite majorities in these districts. The Jewish community's challenge to this plan failed when this Court determined that the use of racial criteria by the state of New York in its attempt to comply with § 5 of the Voting Rights Act and to secure the approval of the Attorney General did not violate the Fourteenth Amendment. A plurality of this Court concluded that:

> Implicit in *Beer* [v. *United States*, 425 U.S. 130 (1976)] and *City of Richmond* [v. *United States*, 422 U.S. 358 (1975)], then, is the proposition that the Constitution does not prevent a State subject to the Voting Rights Act from deliberately creating or preserving black majorities in particular districts in order to ensure that its reapportionment plan complies with § 5....Contrary to petitioners' first argument, neither the Fourteenth nor the Fifteenth Amendment mandates any *per se* rule against using racial factors in districting and apportionment.
>
> *****
>
> Unless we adopted an unconstitutional construction of §5 in *Beer* and *City of Richmond*, a reapportionment cannot violate the Fourteenth Amendment merely because a State uses specific numerical quotas in establishing a certain number of black majority districts.

U.J.O., 430 U.S. at 161-162.

While *U.J.O.* was decided well before the 1982 congressional disclaimer against proportional representation, its holding allows a finding for the appellants in this case while leaving *Beer*, *City of Richmond*, *U.J.O.* and the Voting Rights Act intact.

In his dissent below, District Judge Voorhees argued that the majority in *Shaw* "has overstated the premise set forth by the *U.J.O.* plurality." J.S. App. A at 36a. Indeed, *U.J.O* in no way

creates an absolute defense based on a state legislature's intended, or proclaimed, compliance with the Voting Rights Act. J.S. at 39a. *Amicus* Republican National Committee agrees.

Implicit in the language from *U.J.O.* set out above rejecting a "*per se* rule ... merely" because a state engages in race-conscious redistricting is an acknowledgment that additional factors could yield a different result. The *U.J.O.* plurality set out several of those factors:

> [We] think it is also [constitutionally] permissible for a State, *employing sound redistricting principles such as compactness and population equality*, to attempt to prevent racial minorities from being repeatedly outvoted by creating districts that will afford fair representation to the members of those racial groups who are sufficiently numerous and *whose residential patterns afford the opportunity* of creating districts in which they will be in the majority.

U.J.O. , 430 U.S. at 168 (emphasis added.).

Only the most self-interested incumbents could argue that the North Carolina General Assembly employed "sound redistricting principles" to construct the challenged congressional districts. The districts are, admittedly, of virtually equal population.[8] But that alone should not insulate this plan from attack. As this Court noted in *Karcher* v. *Daggett:* "[B]eyond requiring States to justify population deviations with explicit, precise reasons, which might be expected to have some inhibitory effect, *Kirkpatrick* [v. *Preisler*, 394 U.S. 526 (1969), requiring a good-faith effort to achieve absolute equality in congressional districts] does little to prevent what is known as gerrymandering."

[8] North Carolina's computer-assisted redistricting was, in fact, a model of equal population. Seven of the twelve districts were constructed with exactly the ideal population of 552,386 while five districts had populations of 552,387. It is the understanding of *amicus* Republican National Committee that appellants will lodge relevant 1990 census data that sets out the populations of these districts.

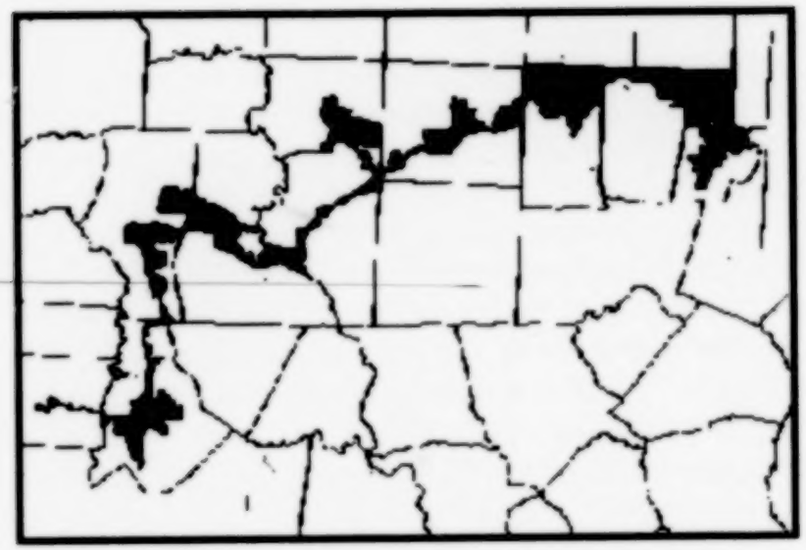
462 U.S. at 734 n.6. In fact, "the rule of absolute equality is perfectly compatible with 'gerrymandering' of the worst sort." *Id.* at 752 (Stevens, J., concurring), quoting *Wells* v. *Rockefeller*, 394 U.S. 542, 551 (1969) (Harlan, J., dissenting); *see also Karcher*, 462 U.S. at 776 (White, J., dissenting).

North Carolina's congressional redistricting plan is gerrymandering of the worst sort. The districts substantially diverge from reasonable standards of compactness and contiguity and arbitrarily ignore long-established communities of interest.[9] The boundaries of many of the districts twist and wind their way across the map of the state in an arbitrary and illogical manner.

These contorted districts are the rule, not the exception, in North Carolina's congressional redistricting plan. Perhaps the most grossly contorted district in the nation is the twelfth congressional district, which serves as the linchpin to the General Assembly's redistricting plan. The twelfth district is one of two districts which the appellees maintain were designed to give black voters an opportunity to elect candidates of their choice, since blacks comprise a 56 percent majority of the population in that district.[10]

[9] The *amicus* Republican National Committee is informed that the appellants will lodge historical examples of congressional redistricting in North Carolina with the Clerk of this Court.

[10] The first and twelfth districts did, in fact, elect black Members of Congress in 1992, Eva M. Clayton in the first and Melvin L. Watt in the twelfth. The remaining ten districts all reelected the incumbents. CAPITOL DIRECTORY, Donnald K. Anderson, Clerk of the House of Representatives (Jan. 3, 1993).



North Carolina's Twelfth Congressional District

The twelfth district is approximately 160 miles long and winds through Alamance, Davidson, Durham, Forsyth, Gaston, Guilford, Iredell, Mecklenburg, Orange and Rowan Counties. For much of its length, the district is no wider than the Interstate Highway 85 ("I-85") corridor. In Davidson County, northbound drivers on I-85 would be in the twelfth congressional district, while southbound drivers would be in the sixth district. In neighboring Guilford County, the districts would "change lanes" with southbound drivers finding themselves in the Twelfth District and northbound drivers in the Sixth District. J.S. App. A at 4a-5a.

In Gaston County, the twelfth district is contiguous only because it runs along a railroad right-of-way created between railroad's tracks and a highway. In Iredell County, the twelfth district intersects at a single "point" with two other districts, at which point the twelfth district "crosses over" the other two districts and is "contiguous" only by a "point" which it shares in common with the two other districts. The twelfth district, like others in the plan, completely diverges from any rational standard of compactness, contiguity or communities of interest.

The manner in which the General Assembly drew the plan had the result of splitting numerous communities into different

congressional districts. A total of 44 counties were split into two or more congressional districts, and a total of seven counties split into *three* or more congressional districts. *See* J.S. App. A at 5a. For example, portions of five counties in the Twelfth District -- Forsyth, Guilford, Iredell, Mecklenburg and Rowan -- were split into *three* separate congressional districts. Similarly, the Town of Davidson and the City of Charlotte have been split into three separate congressional districts.

The General Assembly even elected to split 50 *precincts* along the I-85 corridor into at least two different congressional districts. *Id.* These examples are but a few of the numerous irrational configurations embodied in the plan.

North Carolina's congressional redistricting plan ignores virtually all "sound districting principles." On the contrary, the plan defies common sense and any concept of rational policy. A 1992 editorial in the Wall Street Journal (Feb. 4, 1992) refers to the plan as "Political Pornography."[11] But even more important for the issues in this appeal are the perceptions of local observers throughout the state of the extent to which the plan is a crazy quilt without rationality. An editorial in the Raleigh News and Observer (Jan. 13, 1992)[12] said that it "*plays hell with common sense and community*." Another editorial in the same newspaper (Jan. 21, 1992)[13] concluded: "If a psychiatrist substituted North Carolina's proposed congressional redistricting maps for Rorschach inkblot tests, diagnoses of wackiness would jump dramatically. *The maps ... don't make any sense -- to people who have any sense*."

The General Assembly cannot reasonably maintain that the Voting Rights Act justifies the challenged districts, particularly where less onerous plans consistent with the Act were rejected. As noted by Judge Voorhees below, the General Assembly ignored

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[11] *Pope*, J.S. App. D at 168a.

[12] *Pope*, J.S. App. D at 178a.

[13] *Pope*, J.S. App. D at 159a.

"the proposals of the Attorney General, the North Carolina Republican Party, and some number of nonpartisan groups." J.S. App. A at 43a.

Nothing in this Court's ruling in *U.J.O.*, nor in the Voting Rights Act, sanctions such cartographic lunacy.

IV. THE GENERAL ASSEMBLY'S PRETEXTUAL USE OF THE VOTING RIGHTS ACT TO JUSTIFY THE CHALLENGED DISTRICTS IS CONTRARY TO THIS COURT'S REQUIREMENT OF GEOGRAPHIC COMPACTNESS IN *THORNBURG* V. *GINGLES*.

This Court's ruling in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986) has been called the "pole star of the law in the [voting rights] area, "[14] and, as such, it contains at least one key standard that the North Carolina General Assembly ignored in using the Voting Rights Act as the justification for the challenged district configurations: geographic compactness. In *Gingles*, the Court set out the "necessary preconditions" to prove that multimember districts[15] impair minority voters' ability to elect representatives of their choice. Among them were a requirement of geographic compactness: First, the minority group must be able to demonstrate that it is *sufficiently large and geographically compact to constitute a majority in a single-member district.*

Gingles, 478 U.S. at 50-51 (emphasis added). While this Court did not specifically define "geographic compactness" in *Gingles*, North

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[14] *Jeffers* v. *Clinton*, 730 F. Supp. 196 (E.D. Ark. 1989), *aff'd* 111 S. Ct. 662(1991).

[15] The issue of the applicability of the *Gingles* preconditions to single-member districting plans like the one at issue is currently before the Court in several contexts, including *Voinovich* v. *Quilter*, 794 F. Supp. 695, 794 F. Supp. 756 (N.D. Ohio 1992), *appeal pending*, No. 91-1618 and *Emison* v. *Growe*, 782 F. Supp. 427 (D. Minn. 1992), *appeal pending as Growe* v. *Emison*, No. 91-1420.

Carolina congressional district 1 and 12 cannot meet any common sense definition of compactness.

Similarly, in *East Jefferson Coalition* v. *Jefferson Parish*, 691 F. Supp. 991 (E.D. La. 1988), the court determined that a "proposed district is sufficiently compact if it retains *a natural sense of community*. To retain that sense of community, a district should not be so convoluted that its representative could not easily tell who actually lives within the district." *Id.* at 1007.[16] The court rejected plaintiff's plan which "stretches along the river and reaches around the airport to include a concentration of black residents living above the airport." *Id.* The court refused to accept a plan "which contains a district which is drawn with the acknowledged intent to include minorities, but which does not meet the minimal requirements of reapportionment." *Id.*

By contrast, the court in *Dillard* v. *Baldwin County Bd. of Educ.*, 686 F. Supp. 1459 (M.D. Ala. 1988) rejected an argument that a proposed district was unacceptable because it was "too elongated and curvaceous and thus fail[ed] to meet the requirement of 'compactness.'" The court rejected the argument noting that:

> By compactness, [*Gingles*] does not mean that a proposed district must meet, or attempt to meet, some aesthetic absolute, such as symmetry or attractiveness. An aesthetic norm, by itself, would be not only unrelated to the legal and social issues presented under §2, it would be an unworkable concept, resulting in arbitrary and capricious results, because it offers no guidance as to when it is met. It is apparent from the [*Gingles*] opinion that compactness is a relative term tied to certain practical objectives under §2; the requirement is not that a district be compact, but that it be "sufficiently" compact under §2.

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[16] *See, infra,* at 28 for Professor Grofman's characterization of this as a standard of "cognizability."

Id. at 1465-66.

While this approach may be consistent with a "'functional' view of the political process," under § 2, SENATE COMM. ON THE JUDICIARY, REPORT ON THE VOTING RIGHTS ACT EXTENSION, S. REP. NO. 417, 97th Cong., 2d Sess., AT 29, 30 n.120 (1982), *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 177, its outer limits have been reached in North Carolina.[17]

V. NEUTRAL, TIME-HONORED REDISTRICTING PRINCIPLES EXIST, AND ARE RELEVANT ELEMENTS OF THE CHALLENGED PLAN'S DISCRIMINATORY INTENT AND EFFECT.

A. The Court Should Take a Unified, Consistent Approach to Redistricting Standards

In his dissenting opinion below, Judge Voorhees detailed several of the "sound redistricting principles" contemplated by this Court in *U.J.O.*:

> Time-honored, constitutional concepts of districting, such as *contiguity, compactness, communities of interest, residential patterns, and population equality*, have maintained their obligatory effect and precedential value as deterrents against equal protection encroachments by way of reapportionment based exclusively on racial criteria.

J.S. App. A at 40a (emphasis added).

Amicus Republican National Committee suggests that the Voting Rights Act neither contemplates nor demands purely race-conscious districting that fails to consider, where practicable, neutral redistricting principles and criteria.

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[17] It may be that a different standard should apply for plans enacted remedially as compared to plans enacted in the manner challenged here.

Indeed, this case illustrates the need to adopt these neutral criteria, not only in the context of the Voting Rights Act, but in all redistricting contexts, because "[there] is only one Equal Protection Clause. [The] Clause does not make some groups of citizens more equal than others." *Karcher*, 462 U.S. at 749 (Stevens, J., concurring).

In his concurring opinion in *Garza* v. *County of Los Angeles*, 918 F.2d 763 (9th cir. 1990), *cert. denied*, 111 S. Ct. 681 (1991), Judge Kozinski noted that "[the] Supreme Court in *Davis* v. *Bandemer*, 478 U.S. 109 (1986), left open whether and under what circumstances political gerrymandering may amount to a violation of the Voting Rights Act. *Id.* at 118 n. 8." *Garza,* 918 F.2d at 779 (Kozinski, J., concurring). In *Garza*, the Los Angeles County Board of Supervisors was found "to have acted primarily on the political instinct of self-preservation." *Id.* at 771. The Ninth Circuit noted that in choosing fragmentation of the Hispanic voting population as the avenue by which to achieve this self-preservation, "[the] Supervisors intended to create the very discriminatory result that occurred. That intent was coupled with the intent to preserve incumbencies, but the discrimination need not be the sole goal in order to be unlawful." *Id.*, *citing Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977).[18]

Likewise, the desire for incumbency protection, whether based on racial or political animus, led to the discriminatory districting challenged here. This confluence of political motive and discriminatory racial effect is an evident and continuing part of our system, and suggests that political and racial gerrymanders should be subject to similar analysis in order to achieve consistent, fair and effective representation for all citizens.[19]

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[18] *Accord, Republican Party of North Carolina* v. *Martin,* No 91-1741 (slip op. at 19) (4th Cir. Nov. 24, 1992) (LEXIS 30968).

[19] While the special characteristics of partisan as opposed to racial gerrymandering -- e.g. the mutability of partisan affiliation -- may allow for differing threshold effects showings, "there is a direct connection between the test for racial vote dilution enunciated in *Thornburg* v.

There is no significant difference between a partisan gerrymander which has racial effects, and a racial gerrymander such as this one where race is the surrogate used to achieve the political goal of incumbency protection.[20]

"[District] representation is a zero-sum game. Explicit favoring of one subgroup adversely affects another group (and the political party with which it is aligned)." R. Dixon, *Fair Criteria and Procedures for Establishing Legislative Districts*, in REPRESENTATION AND REDISTRICTING ISSUES at 9 (B. Grofman, *et al.*, eds. 1982). In order to arrive at this zero sum, both sides of the equation -- racial and political -- must be analyzed analogously, if not equally. Toward that end, *amicus* Republican National Committee suggests the following criteria as applicable in both contexts.

B. Districts Drawn in Furtherance of the Goals of the Voting Rights Act Should Recognize Legitimate Communities of Interest.

A state's congressional districts should not be distorted because the Voting Rights Act, in order to fulfill its goal of

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Gingles and that for partisan gerrymandering enunciated in *Davis* v. *Bandemer*. That connection draws on the parallels between the predictability of partisan voting patterns on the one hand, and the predictability of levels of racial bloc voting on the other." B. Grofman, *Toward a Coherent Theory of Gerrymandering:* Bandemer *and* Thornburg," in POLITICAL GERRYMANDERING AND THE COURTS 31 (B. Grofman, ed., 1990).

[20] To argue otherwise would be to sanction the anomalous result suggested by counsel for appellees in the recent oral argument before this Court in *Voinovich* v. *Quilter*, No. 91-1618. Counsel for the appellees argued that absent a racial animus in a political gerrymander, "my view is that whites and blacks may not be treated alike because section 2 forbids that." Transcript of Proceedings before the Supreme Court, *Voinovich* v. *Quilter*, No. 91-1618 (Dec. 8, 1992) at 30. Such logic implies that it is permissible for Republicans to be gerrymandered by Democrats, but not the converse, since most blacks are Democrats and protected by the Voting Rights Act.

providing minorities an "equal opportunity to elect candidates of their choice," requires incumbents' districts to be altered. Inherent in the Voting Rights Act's goal is an understanding that any electoral choice is made by electors who share some common interests. The Voting Rights Act does not sanction the mutilation of such common interests merely to protect incumbents.

In fact, communities of interest have been a touchstone of our representational system since the Founders established it. As James Madison noted when discussing the House of Representatives: "Divide the largest State into ten or twelve districts and it will be found that there will be no peculiar local interests in either, which will not be within the knowledge of the representative of the district." *The Federalist* No. 56 at 351 (J. Madison) (Henry Cabot Lodge ed. 1892). He further described why states needed more than one representative:

> It is a sound and important principle that the representative ought to be acquainted with the interests and circumstances of his constituents . . . Were the interests and affairs of each individual State perfectly simple and uniform, a knowledge of them in part would involve a knowledge of them in every other, and the whole State might be completely represented by a single member taken from any part of it.

Id. Madison believed representatives so selected would bring with them "a local knowledge of their respective districts." *Id.* at 352.

Communities of interest can be identified and manageably quantified by many different components. Racial, ethnic, and religious characteristices often are dominant interests, but other factors -- such as urban/rural/suburban nature of the community, geography or income -- are also important and can be overriding. Numerous federal and state courts have found this to be a workable yardstick for analyzing districts.[21] Other courts have also found

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[21] For example, *Carstens* v. *Lamm*, 543 F. Supp. 68 (D. Colo. 1982) described communities of interest as areas which "share common

one or more common interests to be defining characteristics of a community.[22]

C. Compactness Is A Fundamental Principle of Sound Redistricting.

North Carolina's congressional districts are "tortured," even by the admission of the majority below. J.S. App. A at 5a. While *amicus* resists stating its argument in terms of compactness *qua* compactness, the bizarrely shaped districts embodied in the plan warrant further attention. Such analysis is justified by this Court's jurisprudence.

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concerns with respect to one or more identifiable features such as geography, demography, ethnicity, culture, socio-economic status or trade." *Id.* at 91.

See also Legislature of State of California v. *Reinecke*, 10 Cal. 3rd 396, 110 Cal. Rptr. 718, 516 P.2d 6 (Cal. Sup. 1973) which defined "community of interests" as "the social and economic interests common to the population of an area which are probable suspects of legislative action [which] . . . should be considered in determining whether the area should be included within or excluded from a proposed district in order that all of the citizens of the district might be represented reasonably, fairly and effectively." *Id.* at 412.

[22] *Lacomb* v. *Growe*, 541 F. Supp. 160 (D. Minn. 1982) (urban-suburban-rural distinction recognized by court attempt to separate interests as well as one person, one vote standard would allow); *Goddard* v. *Babbit*, 536 F. Supp. 538 (D. Ariz. 1982) (Indian reservation recognized as community of interest which should not be divided by district line in court-drawn plan); *O'Sullivan* v. *Brier*, 540 F. Supp. 1200 (D. Kan. 1982) (metropolitan areas constitute socio economic communities of interest as do agriculturally-oriented rural areas); *S.C. State Conference of Branches, Etc.* v. *Riley*, 533 F. Supp. 1178, 1181 (S.C. 1982) (even though plan splits one county, split maintains Charleston metropolitan community of interest and places remainder of the split county in a district which shares similar interests); *Arizonans for Fair Representation* v. *Symington*, No. Civ. 92-256-PHX-SMM (D. Ariz. May 5, 1992) (court's plan sought to avoid dividing any Indian reservation or placing tribes with antagonistic interests together, while keeping suburban and urban neighborhoods with similar interests).

While Justice Stevens warned in *Karcher* "against defining gerrymandering in terms of odd shapes," 462 U.S. at 755 n.15 (Stevens, J. concurring), it should be recognized that dramatic "departures from compactness are a signal that something may be amiss." *Id.* at 758.[23] Something is indeed amiss in North Carolina, and appellants have been precluded from making their case to remedy this problem.

In *Reynolds* v. *Sims*, 377 U.S. 533 (1964), this Court invalidated the Alabama legislative plan not only because of excessive population deviations, but also because "the existing apportionment ... presented little more than crazyquilts, completely lacking in rationality, *and could be found invalid on that basis alone.*" *Id.* at 568 (emphasis added).

In *Davis* v. *Bandemer*, this Court did not reject the district court's "findings as to ... the contours of particular districts." 478 U.S. at 142 n.20. Rather, the Court determined that "none of the facts found by the District Court were relevant to the question of discriminatory effects." *Id.* While the Court determined that the validity of district configurations "was an issue we did not need to consider," *id* at 142, the Court's ruling does appear to preclude such an analysis in the context of this case where appellants tie those configurations to arbitrary and irrational effects. At the very least, *Bandemer* suggests that evidence of invalid configuration is relevant "to whether the districting plan met legitimate state interests." *Id.*

Relative compactness is a manageable standard, and this and other courts have successfully used considerations of

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[23] *See also* R. Dixon, *Democratic Representation: Reapportionment in Law and Politics* 460 (1968); B. Grofman, *Criteria for Districting* 12, in ELECTORAL LAWS AND THEIR POLITICAL CONSEQUENCES (B. Grofman & A. Lijphart, eds. 1985); Grofman, *An Expert Witness Perspective on Continuing and Emerging Voting Rights Controversies: From One Person, One Vote to Partisan Gerrymandering*, 21 STETSON L. REV. 783 (1992).

compactness, contiguity and jurisdictional splits as criteria in the construction and assessment of plans. *Connor* v. *Finch*, 431 U.S. 407 (1977) noted that plans drawn by a court, in either a deadlock or remedial situation, should minimize deviations and minority vote dilution, as well as be contiguous and compact. Numerous federal district courts have followed this suggestion.[24]

It is not necessary to rely on Justice Stewart's classic definition of obscenity, "I know it when I see it," *Jacobellis* v. *Ohio*, 378 U.S. 184, 197 (1964), to measure whether the North Carolina districts are compact or illegitimately contoured shapes are designed solely to protect incumbents. Meaningful measures of compactness do exist,[25] and can be applied by the district courts in a manageable manner.

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[24] *See, e.g. De Grandy* v. *Wetherell*, 794 F. Supp. 1076 (N.D. Fla. 1992); *Arizonans for Fair Representation* v. *Symington*, No. Civ. 92-256-PHX-SMM (D. Ariz. May 5, 1992) (slip opinion at 11); *Carstens* v. *Lamm*, 543 F. Supp. 68, 87-88 (D. Colo. 1982); *LaComb* v. *Growe*, 541 F. Supp. 145, 148 (D. Minn. 1982); *South Carolina State Conf. of Branches* v. *Riley*, 533 F. Supp. 1178, 1180-81 (D. S.C. 1982); *Lacomb* v. *Growe*, 541 F. Supp. 145 (D. Minn. 1982) and *Shayer* v. *Kirkpatrick*, 541 F. Supp. 922 (W.D. Mo. 1982).

[25] Depending on the configuration of the district, and the geography of the state in which it is located, compactness can be measured by: summing the length of aggregate boundaries, B. Adams, *A Model State Reapportionment Process: The Continuing Quest for "Fair and Effective Representation*, 19 HARV. J. ON LEGIS. 825 (1977); computing the absolute value of the difference between the length and width of the district, L. Eig and M. Seitzinger, *State Constitutional and Statutory Provisions Covering Congressional and State Legislative Redistricting*, Cong. Research Serv. 55 (1981) (citing IOWA CODE § 42.4 (b)); calculating the ratio of the area of a district to the area of smallest possible circumscribing circle, Reock, *Measuring Compactness as a Requirement of Legislative Apportionment*, 5 MIDWEST J. OF POL. SCI. 70 (1971), or by a combination of these and other methods, Polsby & Popper, *op. cit.* at 339-353. Some recent analyses have turned from a geographic analysis to a functional, population-oriented determination. *See, e.g.*, Hofeller & Grofman, *Comparing Compactness of California Congressional Districts Under Three Different Plans* in B. Grofman (ed), POLITICAL GERRYMANDERING AND THE COURTS (1990); Hofeller, Niemi, Grofman & Carlucci, *Measuring the Compactness and the Role of a Compactness Standard in a Test for Partisan Gerrymandering*, 52 J. Pol. 1155-81 (1990). No single definition of compactness can be applied in all cases, since each state's geographic characteristics may preclude one or more applications. However, given the variety of accepted methods of analysis, a district court can determine the most applicable method.

D. The North Carolina General Assembly Arbitrarily and Capriciously Ignored Fundamental Notions of Contiguity In Constructing the Challenged Congressional Districts.

This Court characterized the constitutional claim of the *Baker* v. *Carr* plaintiffs as being "that the [challenged] statute constitutes arbitrary and capricious state action, offensive to the Fourteenth Amendment in its irrational disregard of [any standard of apportionment]." *Baker*, 369 U.S. at 207. As Justice Clark put it, the plan was "a crazy quilt without rational basis." *Id.* at 254 (Clark, J., concurring).

North Carolina's congressional redistricting suffers an even more fatal flaw under this standard -- the districts are not contiguous. This is not defensible under any notion of racial equity since a standard of contiguity is a *sine qua non* for fair and effective representation. In virtually all redistricting plans, contiguity is assumed, and a plan that does not comport with this fundamental standard can serve no rational or legitimate justification, particularly in light of the advances in computer technology that have occurred in recent years. The Court explicitly recognized this in *Karcher* when it noted that "the rapid advances in computer technology and education during the last two decades make it relatively simple to draw *contiguous* districts of equal population and at the same time to further whatever secondary goals the state has." *Id.* at 733 (emphasis added). Here, however, the North Carolina General Assembly perverted the concept of contiguity and used computer technology to draw *noncontiguous* maps, apparently the only way to save incumbents.[26]

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[26] One definition of contiguity is found in Polsby & Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan*

Since contiguity is normally assumed in redistricting and is generally noncontroversial,[27] the lack of contiguity should signal that something is amiss. Several district courts have recognized the issue and invalidated plans which were, among other things, not contiguous.[28]

The need for contiguity in congressional districts should be self-evident, since Members of Congress are required to be elected by single-member districts. 2 U.S.C. §2c (1967). If a two- or three-part noncontiguous district is constitutionally permissible, what would limit the North Carolina General Assembly from constructing, for illegitimate purposes, congressional districts composed of 10, 50 or even 100 pieces of noncontiguous geography? Surely our system of representative government cannot countenance such a result.[29]

Gerrymandering, 9 YALE L. & POL. REV. 301, 330 n. 139 (1991): "The technical definition of contiguity is satisfied when one can travel from one part of a district to any other without having to leave the district." Even if there is contiguity by "point" in the challenged plan -- although a visual analysis suggests that this is by no means certain -- each such point would be *in at least two districts at the same time*.

[27] B. Grofman, *Criteria for Districting: A Social Science Perspective*, 33 U.C.L.A. L. REV. 77, 84 (1985); R. Niemi, *The Relationship Between Votes and Seats: The Ultimate Question in Political Gerrymandering*, 33 U.C.L.A. L. REV. 185, 187 (1985).

[28] In *Winter* v. *Docking*, 356 F. Supp. 88 (D. Kan. 1973), a three-judge federal district court invalidated a Kansas legislative district plan because it found the plan "was based primarily upon the desire to eliminate the necessity of any incumbent members of the House, particularly majority party members, to seek reelection against one another." *Id.* at 91. In so doing, "many of the newly created districts were lacking in compactness and contiguity." *Id.* *See also Wendler* v. *Stone*, 350 F. Supp. 838, 843 (S.D. Fla. 1972) (Roettger, J. dissenting).

[29] Two experts have recently commented on the importance of contiguity in this context:

E. The Geographic Nature of Our Representational System is Thwarted by Districting Which Ignores Compactness, Contiguity and Communities of Interest.

The geographic basis of representation in the House of Representatives is founded on the notion that representatives should be linked in some significant way to the interests of the community they represent. This close affinity between the representative and the represented was central to the Founders' intent in creating the House of Representatives:

> As it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the branch of it under consideration [the House of Representatives] should have an *immediate dependence on, and an intimate sympathy with, the people.*

The Federalist No. 52 at 329 (J. Madison or A. Hamilton) (Henry Cabot Lodge ed. 1892).

A representative elected from districts like those in question is neither immediately dependent upon nor in intimate sympathy with the voters, for the diversity of interests and communities within these districts makes such intimacy problematic.

> Despite the courts' inattention, contiguity is not just a gracenote in the score of democracy; it is crucial, both practically and theoretically. Without the restraint of contiguity, equinumerosity is so diminished that its only real value is symbolic. A contiguity requirement exponentially shrinks the number of available districting options, because in constructing one district, the mapmaker necessarily forecloses the possibility of constructing countless others which would intersect the first.

Polsby & Popper, *op. cit.*, 330-31.

In the modern context, the nature of the affinity between the representative and the represented has been characterized by a leading voting rights expert as "cognizability."

> The notion that representation should be based on geographically defined districts presumes that the link between a representative and his or her constituents is facilitated by candidates being able to campaign in geographically defined areas where door to door campaigning is possible and/or where access to constituents via media channels (e.g. newspapers and radio or TV stations) is made easier by the existence of common sources of information. Even more importantly, in geographically defined districts, the ability of voters to organize and mobilize on behalf of candidates and to collectively organize to influence their current representatives on behalf of policy changes is facilitated by the prospects for door to door organization and information campaigns conducted through the use of common media. Moreover, the 'cognizability' of district boundaries that comes when those boundaries can be clearly identified in terms of proximate geography facilitates voter identification of and with the district.
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> *****
>
> By "cognizability" I refer to the ability of a legislator to define, *in common sense terms, based on geographical referents*, the characteristics of his or her geographic constituency. I should emphasize that, in my view, the appropriate test of cognizability is not whether the voters do know the boundaries of the district in which they reside, but whether those boundaries could, in principle, be explained to them in simple, common sense terms.

B. Grofman, Affidavit in *Pope* v. *Blue,* No. 91-2038, J.S. App. E at 182a-184a.

By any reasonable standard, North Carolina's congressional districts violate such a common sense standard. If these districts are allowed to stand, the House of Representatives,

the institution of our national government designed to be closest to the electorate, may cease to perform its intended constitutional function.

CONCLUSION

North Carolina's tortured congressional districts are unconstitutionally discriminatory in intent and effect. Nothing in the Voting Rights Act, nor in the precedents of this Court, mandate or warrant these district configurations. For these reasons, the judgment of the United States District Court for the Eastern District of North Carolina should be reversed.

Respectfully submitted,

BENJAMIN L. GINSBERG
MICHAEL A. HESS*
DALTON L. OLDHAM
310 First Street, S.E.
Washington, D.C. 20003
(202)863-8638
Counsel for Amicus Curiae
Republican National Committee

*Counsel of Record
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